IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)
	) Civil Action
vs.	) No. 04-MJ-01060
	)
JOHN A. O'NEAL,	)
	)
Defendant	)

O R D E R

NOW, this 7th day of November, 2007, following argument held on October 7, 2005 and for the reasons stated in the accompanying Memorandum,

IT IS ORDERED that the decision of Magistrate Judge Charles B. Smith is affirmed.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. O'NEAL,	)	
	)	
Appellant	)	
	)	Civil Action
vs.	)	No. 04-MJ-01060
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	

* * *

APPEARANCES:

ASSISTANT UNITED STATES ATTORNEY
PAMELA FOA, ESQUIRE
On behalf of the United States of America

JOSEPH P. GREEN, JR., ESQUIRE
On behalf of Defendant

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M E M O R A N D U M

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on appellant defendant's Notice of Appeal, filed December 27, 2004. Defendant also filed Defendant's Brief in Support of Appeal from Conviction by Magistrate Judge on the same date. The Government's response, entitled Brief of the Appellee United States of America, was filed on October 3, 2005.

For the reasons stated below, I affirm the decision of Magistrate Judge Charles B. Smith.

PROCEDURAL HISTORY

On October 28, 2004 defendant John O'Neal was cited for posting a placard on property of the United States Department of Veterans' Affairs ("VA") in violation of 38 C.F.R. § 1.218(a)(9). After trial before Magistrate Judge Charles B. Smith on December 16, 2004, defendant was found guilty and fined $25.00. Defendant then filed a Notice of Appeal on December 27, 2004.

On October 7, 2005 the undersigned heard argument on the issue of defendant's appeal. The undersigned took the matter under advisement.

STANDARD OF REVIEW

Mr. O'Neal's appeal is before this court pursuant to 18 U.S.C. § 3402, which states that "[i]n all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed."

In reviewing a conviction by a magistrate judge, a district court considers "whether a rational trier of fact could conclude beyond a reasonable doubt that the defendant[] [was] guilty." United States v. Klose, 552 F.Supp. 982, 984 (E.D.Pa. 1982)(citing United States v. McQuilkin, 673 F.2d 681, 687 (3d Cir. 1982)). The appropriate scope of review has been analogized by some courts to that of an appeal from a United

States District Court to a United States Court of Appeals, in which findings of fact are reviewed for clear error and findings of law are reviewed de novo. See United States v. Fentress, 241 F.Supp.2d 526, 527 (D.Md. 2003).

FACTUAL BACKGROUND

On October 28, 2004, defendant O'Neal set up a large "Vietnam Veterans Against Kerry" sign outside a hospital operated by the VA in Coatesville, Pennsylvania. Mr. O'Neal had previously applied for, and been denied, a permit allowing him to display his sign on VA property. On October 28, Mr. O'Neal and his display were located directly across the street from the gates to the VA hospital.

Shortly after Mr. O'Neal's arrival, Corporal Richard Sload of the VA Police Service approached Mr. O'Neal and advised him that he was on VA property. Corporal Sload requested that Mr. O'Neal move his display approximately 20 yards. Mr. O'Neal refused, arguing that he was in fact on Pennsylvania Department of Transportation ("PennDOT") property. Following Mr. O'Neal's refusal to relocate the display, Corporal Sload issued a citation to Mr. O'Neal for violation of 38 C.F.R. § 1.218(b)(22).

As stated above, Mr. O'Neal was tried before Magistrate Judge Charles B. Smith on December 16, 2004. Magistrate Judge Smith found Mr. O'Neal guilty and imposed a fine in the amount of $25.00.

DISCUSSION

Contentions of the Parties

Appellant raises a number of arguments in support of his appeal of his conviction. First, appellant argues that the government failed to prove a violation of either 38 C.F.R. § 1.218(b)(22) or 1.218(a)(9). Specifically, appellant argues that both Corporal Sload and Magistrate Judge Smith improperly cited 38 C.F.R. § 1.218(b)(22), which is a penalty provision. Appellant contends that although citation of a penalty provision may not invalidate a conviction, the elements of the applicable rule of conduct (in this case 38 C.F.R. § 1.218(a)(9)) must nonetheless be satisfied.[1]

In this regard, defendant avers that the government failed to prove two elements required by 38 C.F.R. § 1.218(a)(9). Appellant argues that the government did not prove that he "posted" any material or that he was on property owned by the VA at the time of the citation.[2] Defendant argues that he was in fact on a public right-of-way when he was cited by Corporal Sload.

In response, the government argues that 38 C.F.R. § 1.218(b)(22) was properly cited by both Corporal Sload and Magistrate Judge Smith because it is both a penalty provision and

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[1] Defendant's Brief in Support of Appeal from Conviction by Magistrate Judge ("Appellant's Brief") at page 5.

[2] Appellant's Brief at pages 6-7.

a rule of conduct. In the alternative, the government argues that even if 38 C.F.R. § 1.218(b)(22) is in fact a penalty provision, convictions under penalty provisions may stand under both United States v. Fentress, 241 F.Supp. 2d 526, 527 (D.Md. 2003) and United States v. Williams, No. 89-3720, 1990 WL 811 (6th Cir. 1990)(per curiam).[3]

Furthermore, the government argues that the facts established at trial are sufficient to support a conviction under both 38 C.F.R. § 1.218(a)(9) and (b)(22). Specifically, the government contends that appellant clearly displayed a placard. The act of displaying the placard constituted a violation of both provisions. In addition, the government avers that the appellant's activity qualifies as "posting of material", since "to post" is defined as "to station at a given place" and "to publish, announce, or advertise by or as if by use of a placard" in Webster's Ninth New Collegiate Dictionary.[4]

Next appellant argues that his First Amendment rights were violated. In support of this averment, appellant cites the refusal of the VA to grant him a permit to display his poster on VA property. Appellant contends that this refusal was premised on the content of his speech. Appellant argues that the letter sent to him by VA Regional Counsel clearly stated that he would

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[3] Brief of the Appellee United States of America ("Brief of the United States") at pages 4-5.

[4] Brief of the United States at page 6.

not be permitted to display his poster because it sought "to dissuade voters from voting for one particular candidate".[5]

Appellant also argues that his First Amendment rights were violated because he was in a public forum, and the VA regulations should therefore not apply. In particular, plaintiff avers that his display was in a public forum because it was stationed alongside Black Horse Hill Road and the public right-of-way.[6]

Finally, appellant argues that his First Amendment Rights were violated because 38 C.F.R. § 1.218 was not a reasonable time, place and manner regulation. In particular, appellant argues that the regulation applied by the VA fails all three prongs of the test for time, place and manner restrictions established by the Third Circuit.[7] In other words, defendant argues that the regulation is not a reasonable time, place and manner restriction because it is: 1) content-based; 2) not narrowly tailored; and 3) does not allow for alternative methods of communication.

The government responds that Mr. O'Neal's First Amendment rights were not violated. In this regard, the government argues that there is no evidence that the citation

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[5] Appellant's Brief at page 8.

[6] Appellant's Brief at page 9.

[7] Appellant's Brief at page 10.

issued to Mr. O'Neal bore any relationship to the content of the speech.[8] The reasons for denial of the permit requested by Mr. O'Neal are irrelevant, in the government's view, because Mr. O'Neal elected not to appeal that decision. Accordingly, the government suggests that only the citation itself is relevant to the determination of whether the government's action was content-based.[9]

The government also argues that Mr. O'Neal was not, in fact, in a public right-of-way. Rather, the government argues that the schematic diagram of the hospital grounds presented by the government at trial demonstrated that Mr. O'Neal was on federal property. The fact that Mr. O'Neal was across the street from the hospital gates or near a public roadway, in the government's view, does not change the fact that the property belongs to the VA and is not a public forum.[10]

The government responds to appellant's argument regarding the reasonableness of the restriction on speech imposed by 38 C.F.R. § 1.218 by arguing that the standard cited by appellant does not apply because the VA hospital is a non-public forum. Instead, the government argues, the applicable standard states that restrictions "are justified to the extent that the

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[8] Brief of the United States at page 10.

[9] Brief of the United States at page 9.

[10] Brief of the United States at page 8.

speech at issue would interfere with the objective purposes and use of the forum."[11] The government argues that 38 C.F.R. § 1.218 clearly satisfies this standard, which is a form of rational basis review.[12]

Appellant's final argument is that the VA's regulations create a system of unbridled restriction and prior restraint as applied. Although appellant acknowledges that Griffin v. Secretary of Veteran's Affairs, 288 F.3d 1309 (Fed. Cir. 2002), upheld a similar VA regulation, he argues that this situation is distinguishable. In particular, appellant argues that Griffin involved a VA cemetery, and that the same rule should not be applied in the context of a public right-of-way.[13]

In response, the government contends that the doctrine of unbridled discretion is inapplicable because appellant was not in a public forum. The government argues that regulation of speech on VA property may be reviewed only for reasonableness. The government argues, in this regard, that it is certainly reasonable for the VA to seek to create a tranquil atmosphere for veterans seeking treatment at the VA hospital.[14] Thus, the

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[11] Brief of the United States at page 9 (citing Fentress, 241 F.Supp.2d at 531).

[12] Brief of the United States at page 9.

[13] Appellant's Brief at pages 12-13.

[14] Brief of the United States at page 11.

Griffin rule should be followed and the VA regulations should be upheld.[15]

Analysis

I. Failure of Proof

Appellant's first argument, as outlined above, suggested that his conviction must be reversed because the government failed to prove a violation of either 38 C.F.R. §§ 1.218(a)(9) or (b)(22). Defendant also argued that Corporal Sload and Magistrate Judge Smith improperly cited (b)(22), which is a penalty provision rather than a rule of conduct. I disagree.

Specifically, 38 C.F.R. § 1.218(b) effectively incorporates the rules of conduct outlined in 38 C.F.R. § 1.218(a). The title of 38 C.F.R. § 1.218(b) is "Schedule of Offenses and Penalties". Moreover, the text of that section reads, "Conduct in violation of the rules and regulations set forth in paragraph (a) of this section subjects an offender to arrest..." and continues to enumerate a list of fines. It is clear from the text of the regulation that 38 C.F.R. § 1.218(b)(22) is a rule of conduct as well as a penalty provision, and the citation of this regulation by both Corporal Sload and Magistrate Judge Smith was therefore proper.

[15] Brief of the United States at pages 10-11.

In addition, the government has proven the elements required for a conviction pursuant to 38 C.F.R. § 1.218(b)(22). Appellant's argument that the government failed to prove either that he "posted material" or was located "on property" is unavailing.

As the government contends, 38 C.F.R. § 1.218(b)(22) prohibits both the "[d]isplay of placards" and "posting of material". There is no dispute that the appellant displayed a placard. However, the "Violation Notice" issued to appellant charged him with "unauthorized posting of material on property". Although perhaps not the most apt description of plaintiff's activity, the definition of "post" is nonetheless met.[16] Therefore, appellant's argument on this point fails.

With regard to the proof that appellant was "on property" owned by the VA, I uphold Magistrate Judge Smith's findings in this respect as well. At trial, the government presented a map of the area surrounding the VA hospital, with the location of Mr. O'Neal's display and its proximity to VA property lines clearly indicated. The map indicated that Mr. O'Neal and his display were on property owned by the VA.

Although appellant established at trial that his display was set up across the street from the VA hospital gate

[16] The Merriam-Webster Online Dictionary provides that "post" may be defined as "to publish, announce, or advertise by or as if by use of a placard". Accordingly, I find that the distinction drawn by appellant between "display of placards" and "posting of material" is inapposite.

and a bus stop, he presented no evidence to demonstrate that he was on public property.[17] Counsel for appellant asked questions about a "path that appears to act as a sidewalk" near the display, but no evidence of such a path was presented.[18]

I conclude that it was not clear error for Magistrate Judge Smith to find that the evidence presented by the government was sufficient to establish the appellant's location on property owned by the VA. The appellant presented no contrary evidence. The fact that appellant was outside the gates of the hospital or near a bus stop, without more, has no bearing on whether he was on property owned by the VA. Accordingly, I uphold the Magistrate Judge's finding that the government established the element of appellant's presence "on property" to support his conviction under 38 C.F.R. § 1.218(b)(22).

II. Violation of Appellant's First Amendment Rights

Appellant's argument that his speech was regulated based on content fails because it is premised upon the denial of the requested permit rather than the citation at issue here. As the government argued, the proper means of protesting the VA's refusal to issue a permit would have been through appeal of that decision. The decision made with regard to the permit, however,

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[17] Notes of Testimony from Non-Jury Trial at page 6.

[18] Notes of Testimony from Non-Jury Trial at pages 7-8.

has no relevance in determining whether the citation issued to Mr. O'Neal bore a relationship to the content of his speech.

Appellant's remaining two arguments are based upon the presumption that he was in a public forum at the time the citation was issued. As stated above, however, appellant presented no evidence at trial to establish that he was located on public property, nor did he refute the government's evidence that he was on VA property. While regulation of speech in public fora is strictly circumscribed, the VA has much wider latitude in imposing regulations on speech and conduct on its own property.

The Supreme Court of the United States has held that it "is a long-settled principle that governmental actions are subject to a lower level of scrutiny when 'the governmental function operating [is] not the power to regulate or license, as lawmaker,...but, rather, as proprietor, to manage [its] internal operation[s]....'" United States v. Kokinda, 497 U.S. 720, 725, 110 S.Ct. 3115, 3119, 111 L.Ed.2d. 571, 581 (1990)(quoting Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230, 1237 (1961).

This rule has been applied in the specific context of a VA hospital by the United States District Court for the district of Maryland. In Fentress, the court found that a VA hospital is a nonpublic forum. The court noted that "[g]overnment property is a nonpublic forum if 'opening [it] to expressive conduct will

somehow interfere with the objective use and purpose to which the property has been dedicated.'" 241 F.Supp.2d at 531 (citing Warren v. Fairfax County, 196 F.3d 186, 192 (4th Cir. 1999)). In addition, in Griffin the Federal Circuit explained that "we shall assume that other VA properties are also nonpublic fora". 288 F.3d at 1322.

As stated above, I uphold Magistrate Judge Smith's finding that Mr. O'Neal was on federal property at the time his citation was issued. The fact that appellant was outside hospital gates is not dispositive or even particularly relevant. Although Mr. O'Neal was not at the hospital, he was nonetheless on VA property. This property is dedicated to the purpose of treating injured veterans, and "opening [it] to expressive conduct" would interfere with this objective.[19] Accordingly, I conclude that Mr. O'Neal and his poster were in a non-public forum at the time of citation.

Therefore, Mr. O'Neal's remaining arguments regarding the violation of his First Amendment rights must fail. He was on VA property, not in a public right-of-way, so the VA regulations were properly applied. In addition, the standard for reasonable time, place and manner restrictions does not apply where

[19] Corporal Sload testified that the hospital has a psychiatric branch and that patients with post-traumatic stress disorder often seek treatment on an outpatient basis. See Notes of Testimony from Non-Jury Trial at pages 11-12.

defendant is in a non-public forum, as here. See Eichenlaub v. Township of Indiana, 385 F.3d 274, 280 (3d Cir. 2004).

III. Unbridled Discretion and Prior Restraint

With regard to appellant's final argument, I find that the nature of the forum, discussed above, is once again dispositive. Because appellant was not in a public area, the standard to be applied is different from that cited by appellant. As appellant acknowledged, the Griffin court upheld a very similar regulation to 38 C.F.R. § 1.218(b)(22). The fact that Griffin involved a VA cemetery rather than a hospital does not create a basis for distinguishing that case.

As the Griffin court said, the appropriate question is whether the regulation is "necessary to preserve the function and character of the forum". In making this determination in the context of a VA cemetery, the Griffin court looked to whether the grant of discretion was "reasonable in light of the characteristic nature and function" of national cemeteries. Griffin, 288 F.3d at 1323.

Applying the same standard, I find that the regulation at issue here is also reasonable given the nature and function of VA hospitals. Accordingly, appellant's argument that the regulation created a system of unbridled discretion and prior restraint fails.

CONCLUSION

For all the foregoing reasons, the appellant's conviction by Magistrate Judge Charles B. Smith is affirmed.